

KELO V. CITY OF NEW LONDON: IS THE RESPONSE TO CURB THE EFFECT OF THE SUPREME COURT DECISION GOING TOO FAR?

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I. INTRODUCTION

In June 2005, the Supreme Court of the United States decided a landmark eminent domain case, *Kelo v. City of New London*.¹ In a 5-4 decision, the Court held that a development plan for the purpose of economic rejuvenation of unblighted property was considered a “public use” and therefore, a constitutional use of eminent domain power under the Takings Clause of the Fifth Amendment.² The decision has prompted significant outcry and response from the federal government, state legislatures, and grassroots campaigns by citizens of a number of states.³ Citing the lack of federal constitutional protection of private property rights in the wake of the *Kelo* decision, the response intends to restrict state and local government eminent domain power through federal legislation, state legislation, and court challenges to *Kelo*-type takings.⁴ The swift, nationwide response has been at the forefront of media attention.⁵ However, it is unclear whether such immediate and broad remedies will excessively restrict eminent domain powers. Will state governments act hastily in response to the *Kelo* decision and craft remedies so broad that they will limit the ability of government to utilize eminent domain power for necessary future projects that would pass pre-*Kelo* constitutional muster? Or will people be encouraged to challenge legitimate public use takings by popular support, thereby increasing the likelihood of frivo-

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¹ 125 S. Ct. 2655 (2005).

² *Id.* at 2668 (citing U.S. CONST. amend. V, cl. 4).

³ *See infra* Part V.A-C.

⁴ *See infra* Part V.

⁵ *Id.*

lous litigation? These are questions that may surface as state legislatures continue to consider restrictive eminent domain legislation. These questions will also continue to be at the forefront of discussion as long as groups rally to protect victims of condemnation proceedings through constitutional challenges. The ultimate question then arises: will the efforts to limit *Kelo*'s impact result in unintended restraints on the legitimate power of government to take private land for economic development?

This Comment begins with an examination in Part II of the background on eminent domain power and the development of the public use test.⁶ Part III continues with an explanation of the *Kelo* conflict in New London, Connecticut and an analysis of the Supreme Court's reasoning in the decision.⁷ The Comment then assesses in Part IV the potential dangers that may flow from the broad view of eminent domain powers adopted by the Supreme Court.⁸ Part V informs the reader of the federal and state legislation, both proposed and enacted, that attempts to respond to the *Kelo* decision.⁹ This section also examines post-*Kelo* constitutional challenges to *Kelo*-type takings.¹⁰ Further, Part VI addresses the numerous potential routes that governments at any level can pursue in response to *Kelo*, with an examination of the potential advantages and disadvantages of each form of action.¹¹ This Comment recommends a more cautious, restricted governmental response to *Kelo* rather than extensive legislation. The author concludes, in Part VII, that a moratorium on *Kelo*-type takings to allow time for the federal and state legislatures to address the true impact of the *Kelo* decision is the most prudent course of action as opposed to any hastily enacted legislation that may prove too restrictive on the eminent domain power in the future.

II. BACKGROUND ON EMINENT DOMAIN POWER AND THE DEVELOPMENT OF THE PUBLIC USE TEST

The power of the Government to take private property is asserted in the Fifth Amendment of the United States Constitution, and has long been recognized as an inherent power of the sovereign.¹² The Takings Clause of the Fifth Amendment states "nor shall private

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

⁹ See *infra* Part V.

¹⁰ *Id.*

¹¹ See *infra* Part VI.

¹² U.S. CONST. amend. V, cl. 4.

property be taken for public use, without just compensation.”¹³ This restriction on the federal government found in the Fifth Amendment is applicable to the states through the Fourteenth Amendment.¹⁴ Litigation over governmental takings has encompassed a breadth of issues, from defining “public use” in an explicit taking to ascertaining whether government regulation has constituted a regulatory taking.¹⁵ Whether an explicit governmental taking is for a “public use” has been an aspect of the takings doctrine that has developed and changed significantly over the course of history through litigation.¹⁶ The Takings Clause has been often litigated in state courts because of its application to the states through incorporation by the Fourteenth Amendment.¹⁷ Courts have applied a deferential rational basis standard of review when deciding whether a governmental takings satisfies a public use, similar to that used when analyzing the constitutionality of state action under the police power.¹⁸

The most restrictive reading of the Takings Clause would suggest, as some early state courts held, that the “public use” could be satisfied only if the property subject to the governmental taking was actually used by the general public.¹⁹ The Supreme Court departed from this restrictive view early in its jurisprudence, and instead adopted a broader public purpose test.²⁰ The public purpose test is

¹³ *Id.*

¹⁴ *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Selective Bill of Rights provisions, including the Fifth Amendment, are part of the liberty protected from state interference by the Due Process Clause of the 14th Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968).

¹⁵ *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–35 (1978) (applying a balancing test to determine whether a regulatory taking had occurred which would require the city to pay just compensation); *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1019 (1992) (holding that if a property is deprived of all value by a regulation, then this is a total taking requiring just compensation); *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 342 (2002) (holding that a temporary moratorium is not a per se taking and rejecting the idea of conceptually severing the part of the property, either physically or temporally, from the whole). This Comment focuses on the limited question of whether an explicit taking for economic development satisfies a public use. *See infra* Parts III–VII.

¹⁶ *See infra* notes 19–74 and accompanying text.

¹⁷ U.S. CONST. amend. XIV; *Chicago, Burlington & Quincy*, 166 U.S. at 241.

¹⁸ *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955).

¹⁹ *See Ryerson v. Brown*, 35 Mich. 333, 338–39 (Mich. 1887); *Gaylord v. Sanitary Dist. of Chi.*, 68 N.E. 522, 524–25 (Ill. 1903); *Jacobs v. Clearview Water Supply Co.*, 69 A. 870, 872 (Pa. 1908).

²⁰ *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159–61 (1896) (holding that taking for the purpose of constructing an irrigation ditch was a public purpose and in the public interest, and therefore constitutional).

satisfied by a government taking in which the government maintains ownership of the land and utilizes it to promote the general public welfare, such as building a highway or a military base.²¹ The highway would have satisfied the most restrictive interpretation of the public purpose test, but the military base only passes constitutional muster under the broader public purpose test.²² This is because the highway is available for use by the general public, passing even the strictest interpretation, while the military base is not accessible by the general public but exists for a public purpose, failing the strictest interpretation but passing a broader view of the test.²³

The public purpose test is further complicated, however, when the subsequent owner of the private property taken by the government is another private party.²⁴ In the landmark case of *Berman v. Parker*,²⁵ the Supreme Court held that an economic redevelopment plan enacted to cure a blighted neighborhood in Washington, D.C. by selling or leasing the condemned land to a private redevelopment company was constitutional even though a piece of commercial property subject to condemnation was not itself blighted.²⁶ Congress passed the District of Columbia Redevelopment Act ("Act") in 1945 in an effort to eliminate and prevent slum and substandard housing conditions within the city.²⁷ The Act was specifically enacted as a result of a determination that "conditions existing in the District of Columbia with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare."²⁸ Congress further found that in order to eliminate these housing conditions, it would be necessary to acquire all of the property in the area.²⁹ In order to achieve the stated goals, Congress determined that a comprehensive and cohesive plan of redevelopment would be necessary to eliminate the substandard conditions, as opposed to leaving the changes to piecemeal private or public development.³⁰

²¹ *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); *Rindge Co. v. County of L.A.*, 262 U.S. 700, 708 (1923).

²² *Old Dominion Land Co.*, 269 U.S. at 66; *Rindge Co.*, 262 U.S. at 706.

²³ *Old Dominion Land Co.*, 269 U.S. at 66–67; *Rindge Co.*, 262 U.S. at 706.

²⁴ See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); see also *infra* notes 18–52 and accompanying text.

²⁵ 348 U.S. 26 (1954).

²⁶ *Id.* at 35–36.

²⁷ *Id.* at 28.

²⁸ *Id.* (citing D.C. CODE ANN. § 5-701 (LexisNexis 1951), repealed by D.C. CODE ANN. § 6-301.02(4) (LexisNexis 2006)).

²⁹ *Id.*

³⁰ *Id.* at 29.

Further, pursuant to the Act, Congress created the National Capital Planning Commission ("Commission"), and entrusted the Commission with the power of eminent domain to acquire the necessary property to achieve the comprehensive redevelopment and eliminate the blighted neighborhoods.³¹ The Commission was entitled to lease or sell the acquired land to private redevelopment companies, individuals, or partnerships so long as the party would carry out the redevelopment plan.³²

Under the power given by the Act, the Commission developed a comprehensive plan of redevelopment for an area of D.C. which, through extensive findings, the Commission determined to be blighted and beyond repair.³³ The Plaintiffs challenged the taking as unconstitutional because their property, a commercial department store, was not slum housing targeted by the Act.³⁴ Even so, their property was subject to the redevelopment plan and was to be transferred to private ownership.³⁵ The United States District Court for the District of Columbia dismissed the plaintiff's complaint seeking to enjoin the condemnation and held the Act constitutional.³⁶

The Supreme Court addressed the issue of whether the taking authorized by the Act met the requirement of a "public use."³⁷ It first found that Congress had police power authority over the District of Columbia just as a state would have over its affairs.³⁸ To determine whether the redevelopment plan was a "public use" for purposes of the eminent domain power, the Court approached the question from the perspective of Congress' broad police powers.³⁹

³¹ *Berman*, 348 U.S. at 29.

³² *Id.* at 30.

³³ *Id.* The findings included statistics that 64.3% of the dwellings were beyond repair, 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, and 83.8% lacked central heating. *Id.*

³⁴ *Id.* at 31.

³⁵ *Id.*

³⁶ *Schneider v. Dist. of Columbia*, 117 F. Supp. 705, 724–26 (D.D.C. 1953).

³⁷ *Berman*, 348 U.S. at 33–34.

³⁸ *Id.* at 31–32.

³⁹ *Id.* at 32. As the Court asserts:

We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been

The Court understood Congress' powers to promote the public welfare to be very broad.⁴⁰ When determining what is in the public welfare, the Court noted that the public welfare is "spiritual as well as physical, aesthetic as well as monetary . . . beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."⁴¹ The Court determined that a congressional finding of substandard housing conditions and blighted neighborhoods where crime and immorality flourish and sanity and cleanliness are lacking can justify using the police power to correct such problems.⁴² However, once a determination is made that the pursued end is legitimate, the means to achieve the end, even use of eminent domain, is within congressional discretion.⁴³ The Court stated that solely because the ultimate owner of the property may be a private party does not make the Act unconstitutional.⁴⁴ The Court further explained that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."⁴⁵ Congress is not required to address a problem one building at a time, but instead can focus on the area as a whole when determining an appropriate course of action and plan.⁴⁶ Therefore, the Court concluded that the comprehensive redevelopment plan to eliminate substandard housing and blight in the city that required a balanced and integrated plan to achieve the goal, thus including appellants' property not itself blighted, was constitutional.⁴⁷ Further, the Court concluded that Congress established adequate standards to eliminate slums and the blighted areas that may produce slums.⁴⁸

Thirty years later, the Supreme Court further declared its deference to legislative judgments regarding the public purpose determination where the subsequent owner would be a private party in *Hawaii Housing Authority v. Midkiff*.⁴⁹ The Hawaii Legislature enacted the Land Reform Act of 1967,⁵⁰ which provided for the condemna-

declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs

Id.

⁴⁰ *Id.* at 33.

⁴¹ *Id.*

⁴² *Berman*, 347 U.S. at 32-33.

⁴³ *Id.* at 33.

⁴⁴ *Id.*

⁴⁵ *Id.* at 33-34.

⁴⁶ *Id.* at 35.

⁴⁷ *Id.* at 34-35.

⁴⁸ *Berman*, 348 U.S. at 35.

⁴⁹ 467 U.S. 229 (1984).

⁵⁰ HAW. REV. STAT. § 516-1, et seq. (1967).

tion of private land held in oligopoly by a few private owners.⁵¹ Prior to 1967, much of the privately owned land in Hawaii, due to a system of land transfers dating from the islands' settlement, was held in the hands of elite private landowners.⁵² Finding that this concentrated land ownership harmed the residential housing market, caused inflation of land prices, and injured the public welfare,⁵³ and with the private landowners unwilling to sell any of their property, the legislature passed the Land Reform Act. The Act gave authority to the Hawaii Housing Authority to condemn the private land and transfer the land to the private party who had previously been leasing such land.⁵⁴ The Hawaii Legislature believed that the condemnation would promote the purpose of redistributing land while ameliorating the harsh tax consequences to the transferor land owners, presumably the primary reason for resistance to sale in the first place.⁵⁵ The transferee private parties would receive the land in fee simple if these parties made a showing that the condemnation would "effectuate the public purposes of the Act" and just compensation was paid to the transferor land owner.⁵⁶ The constitutionality of the Act was challenged as a violation of the Fifth Amendment by a private landowner who would not acquiesce to compulsory arbitration to determine just compensation.⁵⁷ Initially, the District Court of Hawaii's opinion was that the Land Reform Act was constitutional.⁵⁸ However, on review, the Court of Appeals for the Ninth Circuit held the Land Reform Act unconstitutional because it did nothing but change the ownership of land from one private party to another.⁵⁹

The Supreme Court, in reversing the Court of Appeals for the Ninth Circuit, held that a condemnation of private property by the state legislature of Hawaii in an effort to divide a land oligopoly amongst greater number of owners was constitutional.⁶⁰ After a discussion of *Berman v. Parker*,⁶¹ the majority reiterated its holding that

⁵¹ *Midkiff*, 467 U.S. at 233.

⁵² *Id.* at 232. The state and federal governments owned almost forty-nine percent of the state's land and another forty-seven percent was in the hands of only seventy-two private landowners. *Id.* Further, of this forty-seven percent owned privately, forty percent was owned by only eighteen landowners. *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 233.

⁵⁵ *Midkiff*, 467 U.S. at 233.

⁵⁶ *Id.* at 233 (internal citations omitted).

⁵⁷ *Id.* at 234–35.

⁵⁸ *Midkiff v. Tom*, 483 F. Supp. 62, 69–70 (D. Haw. 1979).

⁵⁹ *Midkiff v. Tom*, 702 F.2d 788, 798 (9th Cir. 1983).

⁶⁰ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

⁶¹ 348 U.S. 26 (1954).

“[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”⁶² The majority explained that decisions of the legislature, even those involving the eminent domain power, shall be granted judicial deference, and the Court will “not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”⁶³ The Court noted that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”⁶⁴ The majority held that the Hawaii Act was constitutional as a valid exercise of the State eminent domain power to break up the land oligopoly and eliminate the evils which followed from such a situation because the methods used by the legislature and the procedures employed were a “comprehensive and rational approach to identifying and correcting market failure.”⁶⁵ The use of the eminent domain power was a rational approach to serve a legitimate legislative purpose regardless of the fact that the property was transferred to another private owner.⁶⁶ The Court made clear that a taking “executed for no reason other than to confer a private benefit on a particular private party” would be unconstitutional.⁶⁷ However, the Hawaii Act did not confer such a private benefit, but instead attacked the evil of concentrated property ownership, which was a legitimate public purpose.⁶⁸

Inevitably, with such a broad interpretation of public use, state governments began to utilize their power under eminent domain for economic redevelopment projects that were not intended to cure blight, but solely to provide an economic boost.⁶⁹ In 1981, for example, the Supreme Court of Michigan upheld a statute which allowed for condemnation of private land to “alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce.”⁷⁰ The statute’s purpose was to condemn private property in

⁶² *Midkiff*, 467 U.S. at 240.

⁶³ *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)) (internal citations omitted).

⁶⁴ *Id.*

⁶⁵ *Id.* at 242.

⁶⁶ *Id.* at 243.

⁶⁷ *Id.* at 245.

⁶⁸ *Midkiff*, 467 U.S. at 245.

⁶⁹ *See, e.g.*, Michigan Economic Development Corporations Act, MICH. COMP. LAWS § 125.1622 (1981).

⁷⁰ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

order to build a General Motors assembly plant.⁷¹ The General Motors plant did not come close to living up to its expected revenue and job creation, and “[i]n all likelihood, it destroyed more jobs than it created.”⁷² Subsequently, however, in 2004, the Supreme Court of Michigan overruled its own earlier holding, and held that a generalized economic benefit to the community that is the product of a private entity’s profit maximization is not a public use.⁷³ The Supreme Court of the United States granted certiorari in *Kelo* to clarify the law in this area in its 2004 term.⁷⁴

III. WHAT HAPPENED IN NEW LONDON, CONNECTICUT?

A. *Susette Kelo and the Victims of the Condemnation*

Susette Kelo and her neighbors made their homes, some over a century old, in New London, Connecticut, which they enjoyed for its waterfront location since the early 1900s.⁷⁵ Some moved in more recently, but have nonetheless taken great care to improve and maintain their private residences.⁷⁶ Still others were owners of investment properties in the area.⁷⁷ They all came together to challenge a city council that made it quite clear that it would prefer revenue generating redeveloped real estate in the city instead of private homeowners.⁷⁸ In total, nine people owned fifteen properties in the area that was the subject of this heated litigation.⁷⁹ None of the property in question was kept in disrepair or blighted condition so as to require redevelopment.⁸⁰ These people were not holding out for more money; they were fighting for their right to stay in their homes with their families.⁸¹

⁷¹ *Id.* at 457.

⁷² Institute for Justice, *Landmark Eminent Domain Abuse Decision*, IJ.com (July 31, 2004), http://www.ij.org/private_property/michigan/7_31_04pr.html.

⁷³ *Hathcock*, 684 N.W.2d at 787.

⁷⁴ *Kelo v. City of New London*, 542 U.S. 965 (2004).

⁷⁵ Petitioner, Wilhelmina Dery, has been in her home in New London since 1918, and her husband has lived in the house for nearly sixty years, since they married. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005). The house has been in the family for over 100 years, and her son lives next door. *Id.* at 2671. (O’Connor, J., dissenting).

⁷⁶ Susette Kelo has lived in her home since 1997 and has made substantial improvements to the home since she moved in. *Id.* at 2660.

⁷⁷ Petitioners live in ten of the properties and five are investment properties. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Kelo*, 125 S. Ct. at 2660.

⁸¹ *Id.* at 2672 (O’Connor, J., dissenting).

B. You're in the Way, So the Government Will Force You Out

The City of New London became a target for economic redevelopment in 1998 after years of economic decline and increased unemployment levels.⁸² In an effort to plan a cohesive redevelopment of the city, a private nonprofit organization, the New London Development Corporation (NLDC), reemerged after years of being inactive.⁸³ Only a month after a planning budget was created for the NLDC,⁸⁴ Pfizer announced the construction of a \$300 million research facility next to the proposed redevelopment area.⁸⁵ In an attempt to capitalize on the industry moving into the area, the NLDC planned and submitted redevelopment plans to state agencies, which approved these schemes.⁸⁶ The development plans included areas for a hotel, restaurants, shopping, marinas, new residences, research and development office space, and “park support” (parking or retail service for the state park).⁸⁷ In order to effectuate the plan, the city council authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the city’s name.⁸⁸ The plan was intended to create jobs, generate tax revenue, help revitalize downtown New London, beautify the city, and make the waterfront and park leisure and recreational destinations.⁸⁹ The NLDC, during litigation, declared they would lease some of the land to private developers should the developers go along with the plan.⁹⁰

C. The Fight Moves to the Courts

Nine victims of the condemnation filed suit against the city council and the NLDC in New London Superior Court asserting that the taking of their land could not be considered a “public use” as required by the Fifth Amendment.⁹¹ The Superior Court granted an

⁸² *Id.* at 2658–59.

⁸³ *Id.* at 2659.

⁸⁴ The State authorized a \$5.35 million bond issue for planning activities and a \$10 million bond issue for a state park. *Id.*

⁸⁵ *Id.*

⁸⁶ *Kelo*, 125 S. Ct. at 2659.

⁸⁷ *Kelo v. City of New London*, 843 A.2d 500, 509–10 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005) (specifically describing the property to be developed and the planned development).

⁸⁸ *Kelo*, 125 S. Ct. at 2659–60.

⁸⁹ *Id.* at 2659.

⁹⁰ *Id.* at 2660 n.4.

⁹¹ *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789, at *1 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd in part, rev'd in part*, 125 S. Ct. 2655 (2005).

injunction prohibiting the taking of property for the park or marina support.⁹² However, the court also held that the property scheduled to be used as office space could be condemned for the redevelopment.⁹³

Because of the divided judgment by the New London Superior Court, allowing eminent domain for some of the property and granting an injunction for other parts,⁹⁴ the landowners and the city council both appealed the decision.⁹⁵ The Supreme Court of Connecticut, pursuant to statute,⁹⁶ transferred the appeal from the Appellate Division.⁹⁷ In a comprehensive opinion analyzing each parcel of redevelopment, the Supreme Court of Connecticut found the entire redevelopment program constitutional, thereby affirming in part and reversing in part the judgment of the superior court.⁹⁸ The court held that the city council's proposed takings were all valid because the taking of land as part of economic development project furthers the public interest and thus satisfies the public use requirement.⁹⁹ The Supreme Court of Connecticut specifically held that the municipal economic development was a constitutionally valid public use considering that the intended use of land was sufficiently definite and had been given "reasonable attention" during the planning process, which was significant to ensure that the plan was being enacted with the public interest as the primary objective.¹⁰⁰

It was in this decision of the Supreme Court of Connecticut that the first judicial voices of dissent were heard.¹⁰¹ Three of the seven justices, dissenting, did not believe that the takings at issue in New London were for a valid public use and further believed that there should be a heightened standard of review for takings for economic redevelopment.¹⁰² In order for an economic development plan to be a valid public use, according to the dissent, clear and convincing evidence needs to be presented that the benefits of the development

⁹² *Id.* at *341.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Kelo v. City of New London*, 843 A.2d 500, 507–08 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

⁹⁶ CONN. GEN. STAT. § 51-199(c) (2005).

⁹⁷ *Kelo v. City of New London*, 843 A.2d 500, 508 n.3 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

⁹⁸ *Id.* at 574.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 573–74.

¹⁰¹ *Id.* at 574 (Zarella, J., concurring in part and dissenting in part). Justice Sullivan and Justice Katz joined in Justice Zarella's opinion. *Id.*

¹⁰² *Kelo*, 843 A.2d at 587 (Zarella, J., concurring in part and dissenting in part).

plan would be realized by the city, an idea rejected by the majority because of administrative infeasibility.¹⁰³

The Supreme Court of the United States granted certiorari,¹⁰⁴ and, in a 5-4 decision, affirmed the decision of the Supreme Court of Connecticut that a development plan for unblighted property for a purpose of economic rejuvenation was a public use, and therefore, a valid use of eminent domain power consistent with the Takings Clause of the Fifth Amendment.¹⁰⁵ Justice Stevens delivered the opinion of the Court in which Justices Kennedy, Souter, Ginsburg, and Breyer joined.¹⁰⁶

The *Kelo* majority opinion explained that a city could not take private land to confer a private benefit on a particular private party,¹⁰⁷ nor could it use the pretext of public use to bestow a private benefit.¹⁰⁸ The Court distinguished such scenarios by recognizing, as the Connecticut Supreme Court did, that in New London there was a comprehensive development plan with no illegitimate purpose—the plan was carefully designed to pursue the public welfare goals of the legislature with no evidence that it was favoring a particular private beneficiary.¹⁰⁹ This fact, according to the majority, was sufficient to establish that a particular private party was not benefited by the plan.¹¹⁰

Justice Stevens recognized that, although the land would not be open to the general public, such a requirement has long been abandoned by Supreme Court precedent.¹¹¹ According to such precedent, the Justice explained that the public use language in the Fifth Amendment should be interpreted broadly to mean a public purpose.¹¹² The majority opinion noted the policy of deference to legislative judgments when determining the constitutionality of a taking.¹¹³ Such deference, the majority explained, “afford[s] legislatures

¹⁰³ *Id.* at 588 (Zarella, J., concurring in part and dissenting in part).

¹⁰⁴ *Id.* at 500, *cert. granted*, 542 U.S. 965 (2004).

¹⁰⁵ *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

¹⁰⁶ *Id.* at 2657.

¹⁰⁷ *Id.* at 2661 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

¹⁰⁸ *Kelo*, 125 S. Ct. at 2661.

¹⁰⁹ *Id.*; *Kelo v. City of New London*, 843 A.2d 500, 595 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005) (Zarella, J., concurring in part and dissenting in part).

¹¹⁰ *Kelo*, 125 S. Ct. at 2662.

¹¹¹ *Id.* (citing *Hawaii Hous. Auth.*, 467 U.S. at 244).

¹¹² *Id.* at 2662–63.

¹¹³ *Id.* at 2663–64 (discussing *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

broad latitude in determining what public needs justify the use of the takings power.”¹¹⁴

The Court, citing *Berman v. Parker*,¹¹⁵ stated that judicial deference shall be afforded to the legislature, and approved of the legislature’s goals to make the community “beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”¹¹⁶ Even though the redevelopment program in *Berman* was targeted at rejuvenating a blighted neighborhood,¹¹⁷ the *Kelo* majority found the *Berman* redevelopment plan to have encompassed much more than just correcting blight.¹¹⁸ In making this determination, Justice Stevens analogized the *Berman* plan to the redevelopment plan in New London.¹¹⁹ Although the area in New London was admittedly not blighted, the majority opinion deferred to the city council’s judgment that the unemployment rate and the economic decline in the city were enough to necessitate the economic rejuvenation plan which satisfied the public purpose requirement of the Fifth Amendment.¹²⁰ In ultimately deciding that this plan served a public purpose, Justice Stevens pointed to the new jobs and increased tax revenue that were expected to result from the plan, which would be to the benefit of the general public.¹²¹

Justice Stevens proceeded to reject two rules proposed by the landowners in New London.¹²² The Justice first refused to adopt a bright line rule that economic development is not a public use.¹²³ Pointing to the broad view of public purpose, the deference to legislative judgment, and the role of government in promoting economic development, the majority found no reason to adopt such a rule.¹²⁴ The majority also rejected a proposed rule that the expected public benefits, like tax revenues and more jobs, must be found with “reasonable certainty” before the redevelopment project could begin.¹²⁵ The Court believed this requirement would significantly hinder al-

¹¹⁴ *Id.* at 2664.

¹¹⁵ *See supra* notes 24–48 and accompanying text.

¹¹⁶ *Kelo*, 125 S. Ct. at 2663 (citing *Berman*, 348 U.S. at 33).

¹¹⁷ *See supra* notes 24–30 and accompanying text.

¹¹⁸ *Kelo*, 125 S. Ct. at 2663–64.

¹¹⁹ *Id.* at 2665.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 2665–66.

¹²³ *Id.*

¹²⁴ *Kelo*, 125 S. Ct. at 2665–66.

¹²⁵ *Id.* at 2667–68.

most any redevelopment plan.¹²⁶ In addressing the fact that private parties will benefit from the redevelopment because they may be involved in the construction or other aspects of the implementation, the majority disagreed, noting that private parties often benefit from takings done for a public purpose.¹²⁷ The majority opinion, however, avoided the question of constitutionality of such transfers occurring outside the scope of a comprehensive plan because this was not at issue in the case.¹²⁸

Justice Kennedy, who also joined the opinion of the Court, wrote a concurrence in which he expressed some hesitation and concern over the validity of the taking of land from one private party and transferring it to a different private party.¹²⁹ The concurring opinion affirmed the rational basis test as the appropriate review of governmental takings, but urged that the deferential review should not prevent the Court from striking down takings “intended to favor a particular private party, with only incidental or pretextual public benefits.”¹³⁰ Justice Kennedy advocated a more stringent rational basis review by the courts when an economic development taking may favor a private party, specifically stating that “the objection [should be treated] as a serious one and [the court should] review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.”¹³¹ The concurring opinion found that the economic redevelopment plan in New London was for a valid public purpose because it was clearly established that the plan was carefully designed to provide for economic revitalization and was not intended to specifically benefit any private party.¹³² In foresight, Justice Kennedy noted that takings where the ultimate recipient will be a private party may require a “more stringent standard of review” if there is suspicion of other motives behind the “public purpose,” but foreclosed the idea of a presumption of invalidity for economic redevelopment takings.¹³³

¹²⁶ *Id.* at 2668.

¹²⁷ *Id.* at 2666 (citing *Berman v. Parker*, 348 U.S. 26, 33–34 (1954) (“The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”)).

¹²⁸ *Id.* at 2667.

¹²⁹ *Id.* at 2669–70 (Kennedy, J., concurring).

¹³⁰ *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

¹³¹ *Id.* (Kennedy, J., concurring).

¹³² *Id.* at 2670 (Kennedy, J., concurring).

¹³³ *Id.* (Kennedy, J., concurring).

D. The Dissenting Voices in Support of Private Property Rights

Justice O'Connor wrote a strong dissenting opinion, which was joined by Chief Justice Rehnquist and Justices Scalia and Thomas.¹³⁴ In possibly one of the most cited lines of the entire decision, Justice O'Connor stated that due to the majority's opinion, "[t]he specter of condemnation hangs over all property."¹³⁵ Justice O'Connor urged the Court to realize that allowing economic development to constitute a valid public purpose puts all private property at risk if it can be put to a more beneficial use by the public.¹³⁶ According to Justice O'Connor, private property takings for economic development resulting in incidental public benefits eliminate the distinction between private and public use of property and "thereby effectively . . . delete the words 'for public use' from the Takings Clause of the Fifth Amendment."¹³⁷

In elaborating the Court's role in takings for economic development, O'Connor stated that there must be judicial checks to protect property rights, security of property, and fairness.¹³⁸ The Justice noted that regardless of judicial deference to legislatures, "[a]n external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning."¹³⁹

Justice O'Connor differentiated *Berman* and *Midkiff*, cases heavily relied upon by the majority.¹⁴⁰ While private property was taken for private use in each of those cases, Justice O'Connor distinguished them by pointing to the specific harm that each legislature addressed by condemning the property, as opposed to a vague concept of economic stimulation.¹⁴¹ The Justice noted that, under those circumstances, the public purpose was directly realized by the elimination of the harm.¹⁴² According to O'Connor, this was dramatically different

¹³⁴ *Id.* at 2671 (O'Connor, J., dissenting). Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined the dissent.

¹³⁵ *Id.* at 2676 (O'Connor, J., dissenting).

¹³⁶ *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

¹³⁷ *Id.* (O'Connor, J., dissenting).

¹³⁸ *Id.* at 2672 (O'Connor, J., dissenting).

¹³⁹ *Id.* at 2673 (O'Connor, J., dissenting).

¹⁴⁰ *See supra* text accompanying notes 115–121.

¹⁴¹ *Kelo*, 125 S. Ct. at 2673–74 (O'Connor, J., dissenting) (discussing *Berman v. Parker*, 348 U.S. 26 (1954) (holding that the taking for private use was for the purpose of curing blight and slums from a D.C. neighborhood); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (holding that the taking for private use was to break up the oligopolistic land control structure in Hawaii)).

¹⁴² *Id.* at 2674 (O'Connor, J., dissenting).

from a holding that “the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicated to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.”¹⁴³ Regardless of the fact that there was a comprehensive plan in New London, according to O’Connor, nothing prevents a plan that is less cohesive, less thorough, or more speculative from passing this broadened public purpose test.¹⁴⁴ Justice O’Connor concluded by warning that the deferential review posited by the majority will benefit “those citizens with disproportionate influence and power in the political process, including large corporations and development firms,”¹⁴⁵ and harm “those with fewer resources.”¹⁴⁶

Justice Thomas, although joining in Justice O’Connor’s dissent, also wrote a dissenting opinion of his own.¹⁴⁷ Justice Thomas believed that by affirming that a “vague promise of new jobs and increased tax revenues” satisfies a public purpose for a redevelopment plan that “is also suspiciously agreeable to the Pfizer Corporation,” the Court has essentially allowed for any taking to be considered “for a ‘public use.’”¹⁴⁸ Justice Thomas rejected the idea that any economic redevelopment plan could be a public use by explaining that there was no basis in the original understanding of the Fifth Amendment for it to be construed to mean anything other than “authoriz[ing] takings for public use only if the government or the public actually uses the taken property.”¹⁴⁹ The Justice believed that expanding the “public use” test to become a broad public purpose test and giving significant deference to the legislature in determining that broad public purpose were both products of misguided jurisprudence.¹⁵⁰ According to Justice Thomas, “[n]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.”¹⁵¹ Further, due to being the most frequently targeted places for economic redevelopment, “these losses will fall disproportionately on poor communities.”¹⁵²

¹⁴³ *Id.* at 2675 (O’Connor, J., dissenting).

¹⁴⁴ *Id.* at 2676–77 (O’Connor, J., dissenting).

¹⁴⁵ *Id.* at 2677 (O’Connor, J., dissenting).

¹⁴⁶ *Id.* (O’Connor, J., dissenting).

¹⁴⁷ *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting).

¹⁴⁸ *Id.* at 2677–78 (Thomas, J., dissenting).

¹⁴⁹ *Id.* at 2682 (Thomas, J., dissenting).

¹⁵⁰ *Id.* at 2683–86 (Thomas, J., dissenting).

¹⁵¹ *Id.* at 2686 (Thomas, J., dissenting).

¹⁵² *Id.* at 2686–87 (Thomas, J., dissenting).

The Justice would therefore hold the takings at issue as unconstitutional in violation of the Public Use Clause.¹⁵³

IV. WHAT ARE THE POTENTIAL PROBLEMS WITH SUCH A BROAD VIEW OF THE EMINENT DOMAIN POWER?

The Supreme Court's decision in *Kelo*, embodying a broad view of eminent domain power and allowing governmental takings of land for private use for purposes of economic redevelopment, is unsettling to the nation as a whole for a number of reasons. All property is potentially at risk. If a public benefit can be gleaned by increased tax revenue or more jobs, then how is it ever possible that a taking of residential property for the purpose of putting in commercial development would not be for a public use? Further, given a standard of only deferential rational basis review, it is difficult to determine how potential takings motivated to benefit private parties can be properly scrutinized. Justice Kennedy, in concurrence, urged "meaningful rational basis review,"¹⁵⁴ but how this should be applied is a mystery. Under rational basis review, underhanded motives or particular benefits to private parties becomes a "test of whether the legislature has a stupid staff."¹⁵⁵ As it is likely that any and every economic development taking will be cast in the light of increased tax revenues and higher employment rates, without more intense scrutiny, no court will be able to ascertain underlying motives when politically-connected, private corporations receive land from poor landowners who have no choice but to acquiesce.¹⁵⁶ Further, the public/private distinction after *Kelo* becomes so merged that it emasculates any meaning from the public use test,¹⁵⁷ and as Justice O'Connor pointed out in dissent, this is the trouble with economic development takings where private benefit and incidental public benefit co-exist.¹⁵⁸ While both the majority and dissent recognized that a private taking for the particular benefit of another private party was unconstitutional,¹⁵⁹ with rational basis review and presumption of validity of the taking, it appears disconcertingly easy for the legislature to cover up true motives under a pretext of "tax gains" or "more jobs" or "generalized economic resurgence."

¹⁵³ *Kelo*, 125 S. Ct. at 2687 (Thomas, J., dissenting).

¹⁵⁴ *Id.* at 2670 (Kennedy, J., concurring).

¹⁵⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

¹⁵⁶ *See Kelo*, 125 S. Ct. at 2686–87 (Thomas, J., dissenting).

¹⁵⁷ *See id.* at 2676 (O'Connor, J., dissenting).

¹⁵⁸ *Id.* (O'Connor, J., dissenting).

¹⁵⁹ *See supra* notes 107–08, 130, 136–37, 149 and accompanying text.

Even though concern over the potential implications of *Kelo* may be justified in light of the broad eminent domain power described by the majority of the Court, it is still wise and cautious to avoid any excessive reaction, whether intentional or unintentional. As opposed to succumbing to influence caused by the haste and alarm following the decision, legislatures at the federal and state level should take time to properly analyze the true, practical implications of the decisions, thus avoiding overbroad legislation that may inadvertently constrain even broadly acceptable eminent domain programs. In order to prudently go about such a process, it would be advisable for the legislature to enact a moratorium on takings of private land in which the subsequent owner or occupier will also be a private party, establish a committee to determine proper legislative response, and draft such legislation so as to ensure that its scope is appropriately limited. This Comment discusses the recommended response in more detail in Part VI.

V. WHAT CAN BE DONE ABOUT *KELO*?

A. *Federal Action in the House and Senate*

Congress has moved quickly to propose and pass legislation to limit the effect of the Supreme Court decision in *Kelo v. City of New London*.¹⁶⁰ Both the Senate and the House of Representatives have proposed legislation that would limit *Kelo* by withholding federal funds for economic redevelopment projects.¹⁶¹ The federal government has the power to pass such legislation through the use of Spending Clause of the Constitution.¹⁶²

On November 30, 2005, President Bush signed into law the first federal legislation aimed at curbing the effects of *Kelo*.¹⁶³ The enacted law is an amendment to a Treasury, Transportation, and Housing and Urban Development Appropriations bill barring federal transportation funds from being used in projects that take private

¹⁶⁰ 125 S. Ct. 2655 (2005).

¹⁶¹ See *infra* text accompanying notes 163–79.

¹⁶² U.S. CONST. art. I, § 8 (“Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”); see Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act [hereinafter “Act”], Pub. L. No. 109-115, 119 Stat. 2396 (2005) (Congressional Appropriations Bill expressly utilizing spending clause power).

¹⁶³ Act, Pub. L. No. 109-115, § 726, 119 Stat. at 2494–2495.

property for economic redevelopment that primarily benefit private entities.¹⁶⁴ This legislation was introduced in the House and passed in the Senate before being signed into law by the president.¹⁶⁵ The bill enumerates specified projects that would be considered for a public use, including mass transit, railroad, and other commonly accepted public uses.¹⁶⁶ Further, the bill enumerates as a public use “projects for the removal of an immediate threat to public health and safety or Brownfields as defined in the Small Business Liability Relief and Brownfields Revitalization Act.”¹⁶⁷

The language of the enacted legislation resembles a proposed Senate bill entitled “Protection of Homes, Small Businesses, and Private Property Act of 2005.”¹⁶⁸ The proposed legislation states that eminent domain power is only for public use but further provides that “the term ‘public use’ shall not be construed to include economic development.”¹⁶⁹ The bill is an express limitation on the federal government, but also applies to state and local government by restricting the use of federal funds for such projects.¹⁷⁰ More recently, a bill entitled “Empowering More Property Owners With Enhanced Rights Act of 2005” (EMPOWER Act) has been proposed in the Senate.¹⁷¹ This bill would enhance the rights of, and provide advocates for, private property and small business owners affected by federal use of the eminent domain power.¹⁷²

The House of Representatives has also passed a resolution subsequent to the Supreme Court decision stating its “grave disapproval of . . . the majority opinion of the Supreme Court . . . that nullifies the protections afforded private property owners in the Takings Clause of the Fifth Amendment.”¹⁷³ The resolution states that the Supreme Court opinion justifies eminent domain takings “for the

¹⁶⁴ *Id.*

¹⁶⁵ H.R. 3058, 109th Cong. (2005) (passed on June 30, 2005 by a vote of 231 to 189).

¹⁶⁶ Act, Pub. L. No. 109-115, § 726, 119 Stat. at 2495.

¹⁶⁷ *Id.* The Small Business Liability Relief and Brownfields Revitalization Act is primarily an environmental act passed to provide relief to small businesses from liability under CERCLA and to promote cleanup and reuse of Brownfields and assisted state response for environmental clean up. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

¹⁶⁸ S. 1313, 109th Cong. (2005).

¹⁶⁹ *Id.* at § 3.

¹⁷⁰ *Id.* The States would still have the ability to utilize state funds to pursue these projects, if they so choose, as this is not regulated by the bill. *Id.*

¹⁷¹ S. 1883, 109th Cong. (2005).

¹⁷² *Id.*

¹⁷³ H.R. Res. 340, 109th Cong. (2005) (agreed to by a vote of 365 to 33).

sole benefit of another private person.”¹⁷⁴ The House also has proposed legislation similar to that in the Senate defining “public use” to specifically not include economic development projects.¹⁷⁵ Similarly, the proposed legislation expressly limits the federal government and limits state and local government through the use of federal funds.¹⁷⁶ Other means proposed by representatives in the House to limit private property takings for economic redevelopment are to “withhold community development block grant funds from States and communities,”¹⁷⁷ to limit federal funds for economic development should the government not pay the relocation costs for people whose land is taken for such projects,¹⁷⁸ and to amend the Constitution of the United States.¹⁷⁹

Congress needs to be cautious in passing legislation that may prove to be too constricting on necessary eminent domain power. Much of the proposed legislation is too far reaching, namely those proposed bills that merely say that “economic development never satisfies a public use” and therefore does not support the use of eminent domain power.¹⁸⁰ Further, the House Resolution misstates the majority holding in *Kelo* when it states that the opinion endorses private takings for the sole benefit of another private party.¹⁸¹ This type of resolution is misleading and could lead to legislation that is far more drastic than necessary. Also, the enacted legislation could prove too far-reaching and over-inclusive. Even though the drafters were careful to carve out specific enumerated uses that would support the use of eminent domain, there is little exception in the Act when it comes to economic development, which may be necessary under certain circumstances, evidenced by the grave need for economic redevelopment in blighted neighborhoods which cannot effectively be cured without comprehensive action through government.

¹⁷⁴ *Id.*

¹⁷⁵ H.R. 3083, 109th Cong. (2005); H.R. 3087, 109th Cong. (2005); H.R. 3135, 109th Cong. (2005).

¹⁷⁶ H.R. 3083, 109th Cong. (2005); H.R. 3087, 109th Cong. (2005); H.R. 3135, 109th Cong. (2005).

¹⁷⁷ H.R. 3315, 109th Cong. (2005).

¹⁷⁸ H.R. 3405, 109th Cong. (2005).

¹⁷⁹ H.R.J. Res. 60, 109th Cong. (2005) (amendment to read that “[n]either a State nor the United States may take private property for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project”).

¹⁸⁰ See *supra* notes 168–70 and accompanying text.

¹⁸¹ See *supra* note 173–74 and accompanying text.

B. State Action

In the majority opinion in *Kelo*, Justice Stevens emphasized “that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”¹⁸² Justice Stevens commented that the public use test articulated by the Supreme Court is just the “federal baseline,” and that States may impose stricter requirements for takings, and, in fact, some already do.¹⁸³

Since the *Kelo* decision, legislation has been enacted in twenty-four states and proposed in nearly every other state to limit the effect of the decision on state and local decision makers.¹⁸⁴ The legislation attempts to use different tools and strict definitions to limit the broad eminent domain power announced by the Supreme Court in the decision.

The first state to pass legislation subsequent to *Kelo* was Delaware.¹⁸⁵ In the act, amending the Delaware Code, the legislature mandates that governmental takings must be for a “recognized public use as described at least six months in advance of condemnation proceedings: (i) in a certified planning document, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.”¹⁸⁶ The market value of the condemned property is established by an independent and impartial appraiser.¹⁸⁷ Further, the Delaware Legislature specifies that it is the courts, as opposed to the acquiring agency, that determines compensation to the private party for “reasonable attorney, appraisal and engineering fees.”¹⁸⁸

Following closely behind Delaware, the Alabama Legislature passed legislation limiting state and local exercise of eminent domain power in light of *Kelo*.¹⁸⁹ The Alabama Legislature passed the bill to restrict private property takings for the benefit of another private party.¹⁹⁰ In specifically enumerating the circumstances where private takings would be restricted, the statute directs that “a municipality or county may not condemn property for the purposes of private retail,

¹⁸² *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

¹⁸³ *Id.*

¹⁸⁴ See *infra* notes 185–241 and accompanying text.

¹⁸⁵ DEL. CODE ANN. tit. 29, § 9505(15) (2005).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at § 9505(11).

¹⁸⁸ *Id.* at § 9503.

¹⁸⁹ ALA. CODE §§ 11-47-170, 11-80-1 (2005) (amended by 2005-313 Ala. Adv. Legis. Serv. § 1 (LexisNexis)).

¹⁹⁰ 2005-313 Ala. Adv. Legis. Serv. § 1 (LexisNexis).

office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, non-governmental entity, public-private partnership, corporation, or other business entity.”¹⁹¹ The legislature specifically exempted from the amendment any takings intended to cure an already blighted area.¹⁹² Further, the legislature provided for condemned property, should it cease being used for the purpose for which it was condemned or for some other public use, to be first offered for sale back to the original owner at the same price as was received by the owner at the time of condemnation.¹⁹³

The Texas Legislature also passed a bill amending its Government Code to limit the use of eminent domain for private parties or economic development purposes.¹⁹⁴ The bill declares that any party that is entrusted with the power of eminent domain is prohibited from taking private property if a particular private party is benefited through the use of the property or if the stated public use is “merely a pretext to confer a private benefit on a particular private party.”¹⁹⁵ Further, the amendment prohibits private takings “for economic development purposes, unless . . . [the purpose is] to eliminate an existing affirmative harm on society from slum or blighted areas.”¹⁹⁶ The Texas amendment specifically enumerates uses for which an entity can use eminent domain to seize property, including transportation projects, water supply, hospitals, utility services, sports venue, waste disposal, and other commonly accepted uses of eminent domain power.¹⁹⁷ Further, Sections 2, 3, 4, 5, and 6 refer to specific uses of eminent domain power for collection of information,¹⁹⁸ state highways,¹⁹⁹ Trans-Texas corridor and environmental needs,²⁰⁰ institutes of higher education,²⁰¹ and charitable corporations,²⁰² respectively.

¹⁹¹ ALA CODE § 11-47-170 (2005).

¹⁹² *Id.*

¹⁹³ *Id.* § 11-47-170(c).

¹⁹⁴ TEX. GOV'T CODE ANN. § 2206.0001 (Vernon 2005); TEX. GOV'T CODE ANN. § 502.0037 (Vernon 2005); TEX. TRANSP. CODE ANN. § 203.052 (Vernon 2005); TEX. TRANSP. CODE ANN. § 227.041 (Vernon 2005); TEX. EDUC. CODE ANN. § 51.9045 (Vernon 2005).

¹⁹⁵ TEX. GOV'T CODE ANN. § 2206.001(b)(1) (Vernon 2005).

¹⁹⁶ *Id.* § 2206.001 (b)(3).

¹⁹⁷ *Id.* § 2206.001 (c).

¹⁹⁸ *Id.* § 552.0037.

¹⁹⁹ TEX. TRANSP. CODE ANN. § 203.052 (Vernon 2005).

²⁰⁰ *Id.* § 227.041.

²⁰¹ TEX. EDUC. CODE ANN. § 51.9045 (Vernon 2005).

²⁰² TEX. REV. CIV. STAT. ANN. art. 3183b-1, § 6 (Vernon 2005).

Following close behind these three states which were quick to act, many other states have subsequently enacted legislation to significantly limit the eminent domain power of state and local government as well as any agency or entity which possesses such power. Alaska,²⁰³ Colorado,²⁰⁴ Florida,²⁰⁵ Georgia,²⁰⁶ Idaho,²⁰⁷ Illinois,²⁰⁸ Indiana,²⁰⁹ Iowa,²¹⁰ Kansas,²¹¹ Kentucky,²¹² Louisiana,²¹³ Maine,²¹⁴ Minnesota,²¹⁵ Missouri,²¹⁶ Nebraska,²¹⁷ New Hampshire,²¹⁸ Ohio,²¹⁹ Pennsyl-

²⁰³ H.B. 319, 2006 Leg., 24th Sess. (Alaska 2005) (restricting use of eminent domain power when transfer of land is to private party except in regards to oil and gas development).

²⁰⁴ H.B. 06-1411, 2006 Gen. Assem., Reg. Sess. (Colo. 2006) (requiring clear and convincing evidence of blight prior to condemnation of property).

²⁰⁵ H.B. 1567, 2006 Leg., 108th Sess. (Fla. 2006) (prohibiting taking of private property to eliminate blight or public nuisances and prohibiting transfer of condemned private property to another private party for ten years following the taking).

²⁰⁶ H.B. 1313, 2006 Gen. Assem., Reg. Sess. (Ga. 2006) (specifically defining blight and prohibiting use of eminent domain for economic development except in the instance of curing blight).

²⁰⁷ H.B. 555, 2006 Leg., 58th Sess. (Idaho 2006) (restricting eminent domain for transfers to private parties or for economic development while providing for judicial review of eminent domain takings).

²⁰⁸ S.B. 3086, 94th Gen. Assem. (Ill. 2005) (prohibiting use of eminent domain for private development unless condemned property is in a blighted area).

²⁰⁹ H.B. 1010, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006) (redefining "public use" and implementing provisions to ease private challenges to use of eminent domain power).

²¹⁰ H.F. 2351, 81st Gen. Assem., 2d Reg. Sess. (Iowa 2006) (restricting definition of "public use" and shifting all expenses to the acquiring agency).

²¹¹ S.B. 323, 2006 Leg. (Kan. 2006) (clarifying need for "public use" before eminent domain power can be used and restricting transfers to a private party to situations involving the Department of Transportation or other expressly authorized uses).

²¹² H.B. 508, 2006 Leg. Reg. Sess. (Ky. 2006) (enumerating permissible public uses and eliminating the term "public purpose" from legislation).

²¹³ S.B. 1, 2006 Leg., Reg. Sess. (La. 2006) (constitutional amendment specifically defining public purposes and prohibiting condemnation of property for use by or transfer to a private party).

²¹⁴ L.D. 1870, 2005 Leg., 122nd, 2d Sess. (Me. 2005) (restricting condemnation of property for private business or residential development, enhancement of tax revenue, or transfer to private party except when property is blighted).

²¹⁵ H.F. 2846, 2006 Leg., 84th Sess. (Minn. 2006) (prohibiting takings for private commercial development and defining "blight" to require an endangerment of public health and safety and prohibiting use of eminent domain for economic development and specifically defining public use).

²¹⁶ H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006) (prohibiting use of eminent domain power for economic development and requiring a finding of blight before condemnation of private property unless there is another public use).

²¹⁷ L.B. 924, 2006 Leg., 99th, 2d Sess. (Neb. 2006) (prohibiting use of eminent domain power for economic development, including increased tax revenue, employment, or economic resurgence except in conditions of blight).

vania,²²⁰ South Dakota,²²¹ Tennessee,²²² Utah,²²³ Vermont,²²⁴ West Virginia,²²⁵ and Wisconsin²²⁶ have enacted legislation to limit the impact of *Kelo*. Arizona,²²⁷ California,²²⁸ Connecticut,²²⁹ Massachusetts,²³⁰

²¹⁸ S.B. 287, 159th Gen. Ct., Reg. Sess. (N.H. 2006) (eliminating “areas in the process of becoming blighted” from scope of eminent domain power and changing “public purpose” to “public use”).

²¹⁹ S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2006) (imposing moratorium on use of eminent domain power to condemn unblighted private property and transfer property to another private party for economic development until December 31, 2006).

²²⁰ S.B. 881, 2005 Gen. Assem., Reg. Sess. (Pa. 2006) (prohibiting use of eminent domain power to take private property for private commercial development except for blighted areas in enumerated locations).

²²¹ H.B. 1080, 2006 Leg. (S.D. 2006) (restricting use of eminent domain power to transfer property to private owner or non-governmental entity or for enhancement of tax revenue).

²²² S.B. 3296, 104th Gen. Assem., Reg. Sess. (Tenn. 2006) (specifically defining what constitutes a public use for condemnation of private property and removing the right of eminent domain from certain enumerated entities).

²²³ S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006) (requiring legislative approval after public hearing of the condemnation with the property owners having the right to be heard on the proposal).

²²⁴ S. 0246, 2005–2006 Gen. Assem., Reg. Sess. (Vt. 2006) (prohibiting use of eminent domain to confer private benefit on particular private party and restricting use of eminent domain for economic development).

²²⁵ H.B. 4048, 77th Leg., 2d Sess. (W. Va. 2006) (restricting use of eminent domain power for economic development except in limited circumstances to cure blight).

²²⁶ Assemb. B. 657, 2005–2006 Leg. (Wis. 2005) (prohibiting use of eminent domain power for condemnation of nonblighted property if the transfer is to a private entity).

²²⁷ H.B. 2675, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (on file with law review), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2675 (requiring clear and convincing evidence of slum conditions on a property by property basis before eminent domain power can be used and prohibiting takings for economic development).

²²⁸ S.B. 1206, 2006 Leg. (Cal. 2006) (on file with law review), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1201-1250/sb_1206_bill_20060929_chaptered.pdf (redefining blight and prohibiting inclusion of nonblighted property in eminent domain taking to cure blight); A.B. 1162 (Cal. 2006) (on file with law review), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1151-1200/ab_1162_bill_20050902_amended_sen.pdf (proposing moratorium on takings of private property for private use until specified date); S.B. 1210, 2006 Leg. (Cal. 2006) (on file with law review), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1201-1250/sb_1210_bill_20060929_chaptered.pdf (proposing prohibition on takings of nonblighted private property for economic development or increased tax revenue); A.C.A. 15 (Cal. 2005) (on file with law review), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0001-0050/sca_15_bill_20050823_amended_sen.pdf (proposing constitutional amendment prohibiting redevelopment without a written finding of both physical and economic blight).

Michigan,²³¹ Montana,²³² New Jersey,²³³ New York,²³⁴ North Carolina,²³⁵ Oklahoma,²³⁶ Oregon,²³⁷ Rhode Island,²³⁸ South Carolina,²³⁹ Tennes-

²²⁹ L.C.O. 24, Gen. Assem., Feb. 2006 Sess. (Conn. 2006) (on file with law review) (proposing a prohibition on takings for economic development unless part of a comprehensive redevelopment plan which provides public use, is not for primary benefit of private party, and is reasonably necessary to accomplish redevelopment); L.C.O. 34, Gen. Assem., Feb. 2006 Sess. (Conn. 2006) (on file with law review) (proposing specifically enumerated "condemnation-eligible" property).

²³⁰ H.B. 4604, 184th Gen. Ct. (Mass. 2006) (on file with law review), *available at* <http://www.mass.gov/legis/bills/house/ht04pdf/ht04604.pdf> (proposing a prohibition on takings for economic development except to remedy substandard or blighted housing conditions); H.B. 4605, 184th Gen. Ct. (Mass. 2006) (on file with law review), *available at* <http://www.mass.gov/legis/bills/house/ht04pdf/ht04605.pdf> (proposing a restriction on eminent domain when the sole purpose is economic development).

²³¹ S.J.R. E, 93rd Leg., Reg. Sess. (Mich. 2005) (on file with law review), *available at* <http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf> (proposing prohibition on takings for economic development or tax revenues); H.J.R. N., 93rd Leg., Reg. Sess. (Mich. 2005) (on file with law review), *available at* <http://www.legislature.mi.gov/documents/2005-2006/jointresolutionintroduced/House/pdf/2005-HIJR-N.pdf> (proposing a prohibition on takings for the primary benefit of private entities); Act of Sept. 20, 2006, 2006 Mich. Pub. Acts 367 (proposing same); H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2006) (on file with law review), *available at* <http://www.legislature.mi.gov/documents/2005-2006/publicact/pdf/2006-PA-0367.pdf> (proposing same); S.B. 693, 93rd Leg., Reg. Sess. (Mich. 2005) (on file with law review), *available at* <http://www.legislature.mi.gov/documents/2005-2006/publicact/pdf/2006-PA-0368.pdf> (proposing same).

²³² Ballot Init. 154 (Mont. 2006) (decertified from ballot consideration as of Oct. 21, 2006 due to recent court decisions) (on file with law review), *available at* <http://sos.mt.gov/ELB/archives/2006/I/I-154.asp> (proposing a requirement of clear and convincing evidence that property is a danger to safety and health of the community on a property-by-property basis before a direct or indirect transfer of private property to a private party).

²³³ S.B. 156, 212 Leg., Reg. Sess. (N.J. 2006) (on file with law review), *available at* http://www.njleg.state.nj.us/2006/Bills/S0500/156_I1.PDF (proposing a prohibition on use of eminent domain under redevelopment laws); Assem. B. 3277, 212 Leg., Reg. Sess. (N.J. 2006) (on file with law review), *available at* http://www.njleg.state.nj.us/2006/Bills/A3500/3277_I1.PDF (proposing same); S.B. 211, 212 Leg., Reg. Sess. (N.J. 2006) (on file with law review), *available at* http://www.njleg.state.nj.us/2006/Bills/S0500/211_I1.PDF (proposing moratorium on use of eminent domain); Assem. B. 2423, 212 Leg., Reg. Sess. (N.J. 2006) (on file with law review), http://www.njleg.state.nj.us/2006/Bills/A2500/2423_I1.PDF (proposing a forty-eight month moratorium on certain uses of eminent domain).

²³⁴ Assem. B. 9060 (N.Y. 2005) (on file with law review), *available at* <http://assembly.state.ny.us/leg/?bn=A09060&sh=t> (proposing creation of a state commission to consider eminent domain laws); S.B. 6216 (N.Y. 2006) (on file with law review) (proposing same); Assem. B. 9043 (N.Y. 2006) (on file with law review), *available at* <http://assembly.state.ny.us/leg/?bn=A09043&sh=t> (proposing a requirement of a comprehensive development plan for economic development taking, and requiring municipal approval of such plans); S.B. 5946 (N.Y. 2005) (on file with law review) (proposing same); Assem. B. 9144 (N.Y. 2005) (on file with law review), *available at* <http://assembly.state.ny.us/leg/?bn=A09144&sh=t> (proposing that trans-

see,²⁴⁰ and Virginia²⁴¹ all have legislation pending in their respective state legislatures.

fers to private developers be subject to unanimous vote of the local government board and permissive referendum by the public).

²³⁵ H.B. 1854, Gen. Assem., 2005 Sess. (N.C. 2005) (on file with law review), *available at* <http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1854v1.html> (proposing a prohibition on eminent domain takings for economic development or increased tax base); S.B. 1222, Gen. Assem., 2005 Sess. (N.C. 2005) (on file with law review), *available at* <http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S1222v1.html> (proposing same).

²³⁶ S.B. 1035, 50th Leg., 2d Sess. (Okla. 2006) (on file with law review) (proposing a prohibition on eminent domain transfers to a private party for the primary purpose of benefiting that private party); H.B. 2092, 50th Leg., 2d Sess. (Okla. 2006) (on file with law review) (proposing that condemning agency may not sell condemned private property for five years after taking to any person besides original property owner); S.B. 1408, 50th Leg., 2d Sess. (Okla. 2006) (on file with law review) (proposing a prohibition on eminent domain transfers to any private party).

²³⁷ H.B. 3505, 73rd Leg. Assem., Reg. Sess. (Or. 2005) (on file with law review), *available at* <http://www.leg.state.or.us/05reg/measpdf/hb3500.dir/hb3505.intro.pdf> (proposing a prohibition on takings unless the property is to be owned, maintained, occupied, and used by the public for public purposes).

²³⁸ H.B. 6636, 2005 Gen. Assem., Jan. Sess. (R.I. 2005) (on file with law review) (urging Congress to amend the Constitution to protect private property rights and nullify *Kelo* decision); S.B. 1237, 2005 Gen. Assem., Jan. Sess. (R.I. 2005) (on file with law review) (urging same).

²³⁹ H.B. 4295, Gen. Assem., 116th Sess. (S.C. 2005) (on file with law review), *available at* http://www.scstatehouse.net/sess116_2005-2006/bills/4295.htm (proposing a definition of public use to require a "significant and direct" public benefit as opposed to a secondary or incidental benefit while a private party has the primary benefit); S.B. 1029, Gen. Assem., 116th Sess. (S.C. 2005) (on file with law review), *available at* http://www.scstatehouse.net/sess116_2005-2006/bills/1029.htm (proposing creation of eminent domain study committee to review eminent domain power); S.B. 1030, Gen. Assem., 116th Sess. (S.C. 2005) (on file with law review), *available at* http://www.scstatehouse.net/sess116_2005-2006/bills/1030.htm (proposing deletion of provisions providing for use of eminent domain to clear blighted or slum areas); A. 458, S.B. 1029, Gen. Assem., 116th Sess. (S.C. 2006) (on file with law review), *available at* http://www.scstatehouse.net/sess116_2005-2006/bills/1029.htm (proposing deletion of provisions providing for use of eminent domain to clear blighted or slum areas).

²⁴⁰ H.B. 2432, 2005 Gen. Assem. (Tenn. 2005) (on file with law review), *available at* http://www.legislature.state.tn.us/info/Leg_Archives/104GA/Bills/BillText/HB2432.pdf (proposing a prohibition on eminent domain takings for economic development or increased tax revenues); S.B. 2421, 2005 Gen. Assem. (Tenn. 2005) (on file with law review), *available at* http://www.legislature.state.tn.us/info/Leg_Archives/104GA/Bills/BillText/SB2421.pdf (proposing a prohibition on takings primarily for economic development and a shift of the burden of proof to the condemning agency).

²⁴¹ H.B. 1278, 2006 Gen. Assem. (Va. 2006) (on file with law review), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB1278> (proposing that "public use" shall not include takings of private property for the primary purpose of tax revenue enhancement).

State legislatures, although empowered with the ability to provide greater protection to private landowners, should consider such alternatives carefully. Rather than restricting the use of eminent domain power, it is likely that many states may just need to give specific clarification on what can be considered a public use. Due to the *Kelo* decision, the baseline for a public use is set low, but that does not mean that it is non-existent. The most prudent move would be for states to thoroughly analyze their current eminent domain laws, their history, and their use, while imposing a moratorium on eminent domain actions to alleviate any public pressures. Through this careful and reasoned response, the legislatures will be able to act in the best interest of their constituents without making any rash decisions.

C. *Grassroots Campaign*

The Institute for Justice, a libertarian group campaigning in favor of private property rights,²⁴² spearheaded a \$3 million campaign, entitled “Hands Off My House,” looking to protect citizens and property rights groups in the fight against broad eminent domain power.²⁴³ Further, the group has drafted model legislation in order to facilitate state government efforts to limit the effect of *Kelo*.²⁴⁴ The Institute for Justice has also represented homeowners who fall victim to government takings through the use of eminent domain.²⁴⁵

Statistics have shown that almost ninety percent of Americans express disapproval of the governmental takings that are permitted by the Supreme Court after *Kelo*.²⁴⁶ In clever protest to *Kelo*’s embrace of a broad eminent domain power, a group of property rights activists have petitioned to have Justice Souter’s home condemned for redevelopment.²⁴⁷ The movement is led by a man from California, Logan Darrow Clements, who seeks to have Souter’s home in Weare, New Hampshire condemned and turned into a hotel, which Clements says will bring significantly higher tax revenue to the town.²⁴⁸ The movement is clearly motivated to prove how harmful

²⁴² *Hands Off Our Homes*, ECONOMIST, Aug. 18, 2005, available at http://www.economist.com/world/na/displayStory.cfm?story_id=4298759.

²⁴³ Juliana Gruenwald, *Kelo Decision Unleashes Grass Roots Backlash Against Private Property Seizures*, 74 U.S. LAW WEEK 2067 (Aug. 9, 2005).

²⁴⁴ *Id.*

²⁴⁵ See, e.g., *City of Norwood v. Horney*, 161 Ohio App. 3d 316, 2005-Ohio-2448, 830 N.E.2d 381 (Ohio Ct. App. 2005).

²⁴⁶ *Hands Off Our Homes*, *supra* note 242.

²⁴⁷ *Nightline: Judging the Judge Activists Turn Tables on Supreme Court Justice* (ABC television broadcast Aug. 26, 2005).

²⁴⁸ *Id.*

Souter's involvement in the *Kelo* majority will be to private property owners, with the name of the proposed hotel being the "Lost Liberty Hotel" and a dining room called the "Just Desserts Café."²⁴⁹ Although the plan is not being taken seriously by many, Clements needs only twenty-five signatures to get the plan on the municipality's schedule in March of 2006, "where a simple majority vote would force the town to take a serious look at claiming and rezoning Souter's property."²⁵⁰ Justice Breyer's vacation home in New Hampshire is also the target of a similar campaign to seize the property for a new park.²⁵¹

As opposed to these campaigns, one challenge to eminent domain power recently lodged by private property owners that was taken seriously by the judiciary was a proposed condemnation of non-blighted private property for economic redevelopment in Ohio.²⁵² On July 26, 2006, the Ohio Supreme Court issued an opinion in favor of private property owners.²⁵³ Represented by the Institute for Justice, the property owners challenged the taking of their property, alleged to be deteriorating, to clear way for privatized chain stores and office buildings.²⁵⁴ The lower court found that although the property was not blighted, it was considered "deteriorating" because there was diversity of ownership and the property could be more productively used if it were condemned and redeveloped into upscale apartments and commercial property.²⁵⁵ The lower court, therefore, allowed for the taking of the property for the development.²⁵⁶ In deciding the appeal, the Ohio Supreme Court explicitly rejected the Supreme Court of the United States' majority opinion in *Kelo*, instead adopting the view of the dissenters in that case as the more appropriate legal framework to interpret the Ohio Constitution.²⁵⁷ The Ohio Supreme Court, in analyzing its state constitution, held that state courts must apply heightened scrutiny "when reviewing statutes that regulate the

²⁴⁹ Fox News, *Land Grab or Just Desserts?*, Aug. 28, 2005, <http://www.foxnews.com/story/0,2933,167137,00.html>.

²⁵⁰ *Id.*

²⁵¹ Gruenwald, *supra* note 243, at 2068.

²⁵² See *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

²⁵³ See *infra* notes 257–60 and accompanying text.

²⁵⁴ *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 105.

²⁵⁵ *City of Norwood v. Horney*, 161 Ohio App. 3d 316, 2005-Ohio-2448, 830 N.E.2d 381, at ¶ 37.

²⁵⁶ *Id.* at ¶ 38.

²⁵⁷ *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 76.

use of eminent-domain powers.”²⁵⁸ Further, the court held that “although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.”²⁵⁹ Finally, the court held that the use of the term “deteriorating” in eminent domain legislation was void for vagueness because it “inherently incorporates speculation as to the future condition of the property to be appropriated rather than the condition of the property at the time of the taking.”²⁶⁰ The Ohio Supreme Court is the first state supreme court to issue a decision on the breadth of its state eminent domain statute after *Kelo*, and, in doing so, is likely one of only few state courts to issue a decision prior to legislative action addressing the issue.

VI. IS THERE A GENERAL OVERREACTION TO *KELO*?

The *Kelo* majority embraces a view of eminent domain power that is considerably more broad than previous takings jurisprudence. Although the Supreme Court, prior to *Kelo*, had put itself on the path of deference to the legislature and rational basis review, it was always careful not to write a blank check.²⁶¹ The majority in *Kelo*, by allowing the government to take private land and transfer it to a subsequent private owner for purposes of generalized economic development, lost sight of its previous jurisprudence. The *Kelo* majority discusses *Berman* as if it is a congruent analysis, but, in fact, *Berman* is readily distinguishable by the overriding goal of the plan, in that case to cure blight. With a readily identifiable problem or harm being cured, as opposed to generalized economic benefit to the community, the Supreme Court had adequately restricted governmental takings power. As Justice O'Connor pointed out in her dissent, the Supreme Court had previously allowed takings of private property with a subsequent private owner to cure a specific harm or evil to society.²⁶² Such a use of the eminent domain power is consistent with the function of government, and legislatures should be careful in going too far in limiting *Kelo*, as they may inadvertently constrict an important government tool. Economic development does not automatically correlate to a misguided or improper taking, as there may be times when it is justi-

²⁵⁸ *Id.* at ¶ 10.

²⁵⁹ *Id.* at ¶ 9.

²⁶⁰ *Id.* at ¶ 10.

²⁶¹ See *supra* notes 24–68 and accompanying text (discussing *Berman* and *Midkiff*).

²⁶² See *supra* notes 140–43 and accompanying text.

fied to combat a specific harm to society, such as blighted neighborhoods or slums that require such governmental action.

The *Kelo* decision, in part due to its own language allowing the States to provide greater protection to private property rights of its citizens, has caused a torrent of action at every level of the country to restrict the effect of the ruling. The list of remedies and tools used by the federal government, state governments, and citizens of the country is broad and varied, some with a more significant effect than others. Overall, legislation and reaction subsequent to *Kelo* can be divided into two categories: innocuous and potentially harmful.

A. *Innocuous Legislation*

Innocuous legislation, both proposed and enacted, in reaction to the *Kelo* decision is legislation that does not present a risk of harmful, possibly inadvertent, consequences. Innocuous legislation encompasses those bills proposed in state legislatures that say little more than “eminent domain may not be used to benefit a particular private party.”²⁶³ This idea adds nothing new to eminent domain jurisprudence at the federal or state level because this specific private taking/private benefit restriction on eminent domain power has been articulated by the Supreme Court in *Hawaii Housing Authority v. Midkiff*,²⁶⁴ and reaffirmed by the majority opinion in *Kelo*.²⁶⁵ This legislation does nothing to address the problem of allowing the public use test to be satisfied by broad economic development. The likely purpose of legislation such as this is to provide peace of mind to those constituents concerned that the government will use its takings power for an improper purpose or with underhanded motives. Assuming the government is acting fairly and without deceitful motives, there is no real risk in passing legislation stating that the government needs to act in such a manner.

Also on the list of innocuous legislation are bills that ensure a right of reverter to the party that is the victim of the condemnation proceedings, regardless of the public use that justified such a taking in the first place.²⁶⁶ Such legislation ensures that the party who loses

²⁶³ See e.g., *supra* notes 224, 231, 236.

²⁶⁴ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

²⁶⁵ *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (“[T]he City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.”).

²⁶⁶ See, e.g., ALA CODE § 11-47-170(c) (2005).

his land will have the first right to buy back the land at the price received as just compensation should the property cease being used for a public use.²⁶⁷ It is hard to see when “economic redevelopment” ceases to be a public use, but this reverter may apply under circumstances where there is a more classic public use, such as a park which no longer functions in that capacity. This legislation is innocuous in two ways. First, it promotes a level of fairness in the condemnation process in that the owner who is forced to leave his land without his consent will have a right or possibility of repossessing the land at no greater cost if a public use is no longer satisfied. Second, the legislation is likely innocuous because it is hard to see its practical effect. Those private owners whose property is condemned by the government for economic development are obviously going to use the funds to relocate and settle into a home or start a new business somewhere else. In theory, the economic development could be terminated and the property offered to the private owner at the same price received, but this could happen many years in the future. Once the property is actually taken and the economic development begins, it is unlikely that a property owner will attempt to repurchase the property.

The most prudent course of action for legislators that has an innocuous effect is enforcing an eminent domain moratorium. This tool is used to stop the use of eminent domain power by state and local government for a determined period of time while the legislature has a chance to study and consider its current eminent domain laws and any proposed changes or increased restrictions to those laws.²⁶⁸ While the moratorium may have the effect of curtailing eminent domain projects currently, it also affords representatives the time and ability to act with prudence because they are not in a race against the clock to stop a specific taking or respond to political pressures from constituents. Instead of a rush to judgment, which could lead to a remedy that is too broad or has harmful future effects, the moratorium gives the opportunity to consider all the consequences of legislation, thus allowing for a more rational, practical decision. It is likely that the legislators may not need to completely overhaul their eminent domain legislation, but instead just clarify the requirements of a

²⁶⁷ *Id.*

²⁶⁸ The eminent domain moratorium was ordered by the Governor of Connecticut Jodi Rell and has halted the redevelopment plan in New London until the legislature has the opportunity to review Connecticut eminent domain laws. Lisa Knepper & John Kramer, *Grassroots Groundswell Grows Against Eminent Domain Abuse*, INST. FOR JUST, July 12, 2005, available at http://ij.org/private_property/connecticut/7_12_05pr.html; see also S.B. 1206, 2005 Leg., Reg. Sess. (Cal. 2005) (proposing moratorium on takings of private property for private use until specified date).

public use. These possible courses of action need to be carefully considered and not the result of rushed reactions to the *Kelo* decision.

B. Potentially Harmful Legislation and Reaction

In the wake of the *Kelo* decision, the surge of responses at both the federal and state level could prove to be excessively restricting, and thus harmful to eminent domain power, long seen as an essential power of the government. Also, the significant increase in public attention towards the power of eminent domain and continued support for challenges to eminent domain power could prove restrictive and harmful to overall government operation.

The most troublesome legislation is that which states “economic development shall not be considered a public purpose.”²⁶⁹ This legislation is potentially harmful because it utilizes inappropriately broad language in crafting a remedy that has the capability of excessively restricting a necessary governmental tool. While some proposed state statutes qualify this language by excepting blighted areas or slums from the purview of the proposed statute,²⁷⁰ much of the proposed legislation contains no such condition.²⁷¹ Proposed bills in both the Senate and the House of Representatives state specifically that the term “public use” shall not be construed to include economic development.²⁷² None of the proposed bills in Congress set forth any circumstances or conditions where economic development would satisfy a public use and therefore be constitutional.²⁷³ The problem with such legislation is that it is directly contradictory to sound Supreme Court precedent,²⁷⁴ and it expressly removes a tool used throughout history to clean up “miserable and disreputable housing conditions” which may “suffocate the spirit by reducing the people who live there to the status of cattle.”²⁷⁵ Further, this legislation does not contemplate any potential situations in the future where eminent domain power may need to be used for economic development to promote a

²⁶⁹ See *supra* notes 206, 207, 208, 214, 216, 217, 220, 224, 225, 228, 230, 231, 235, 240.

²⁷⁰ See *supra* notes 206, 208, 214, 216, 217, 220, 225.

²⁷¹ See *supra* notes 207, 224, 228, 230, 231, 235, 240.

²⁷² See *supra* notes 168–70, 175–76 and accompanying text.

²⁷³ See *supra* notes 168–79 and accompanying text.

²⁷⁴ *Berman v. Parker*, 348 U.S. 26 (1954) (holding that economic redevelopment plan was a constitutional public use because its purpose was to cure blight in a specified area of the city); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (holding that breaking up of land oligopoly creating a more liquid, economic real estate market was constitutional).

²⁷⁵ *Berman*, 348 U.S. at 32.

necessary project or cure a particular harm to society.²⁷⁶ It is a dangerous path to take for legislators to restrict a key governmental tool with such broad language.

This criticism is the same for proposed legislation that specifically enumerates what could constitute a public use for the purposes of eminent domain. Even the strong dissents in *Kelo* state that eminent domain power satisfies a public use if the “targeted property inflicted affirmative harm on society.”²⁷⁷ This restrictive legislation, at both the federal and state level, which specifically removes economic development from the definition of public use, may prevent the government from utilizing an important tool to correct potentially harmful situations.

The federal act signed into law in late November 2005²⁷⁸ also has problems with ambiguity. Specifically, the bill states that “in this Act, the term ‘public use’ shall not be construed to include economic development for the primary benefit of a private party.”²⁷⁹ The language used by Congress remains vague when trying to figure out who receives the “primary benefit.” Cleaning up slums using eminent domain has been an accepted function of the power,²⁸⁰ but, under such circumstances, more often than not the developer would be receiving more of a benefit than each individual property owner. On the other hand, however, the entire redevelopment as a whole when compared to the benefit received by the redeveloper may shift the balance. Further, monetary benefit cannot be considered the sole benchmark to determine “benefit,” as other intangibles, such as comprehensiveness of the plan and increased productivity of the redeveloped neighborhood, must be taken into account. Due to the unsettled nature of the effects of both the *Kelo* decision itself and the response legislation, the future remains uncertain.

VII. CONCLUSION

Kelo is a decision that has been widely criticized for its broad view of the definition of public use and the takings power.²⁸¹ The decision

²⁷⁶ This could include damage brought on by a natural disaster, say, for example, devastation from a hurricane.

²⁷⁷ *Kelo v. City of New London*, 125 S. Ct. 2655, 2674 (2005) (O’Connor, J., dissenting).

²⁷⁸ See *supra* notes 163–67 and accompanying text.

²⁷⁹ Act of Nov. 30, 2005, Pub. L. No. 109-115, § 726, 119 Stat. 2396 (2005); see *supra* note 162.

²⁸⁰ See *supra* notes 40–48 and accompanying text.

²⁸¹ See *supra* Part IV.-V.

has sparked a great reaction by federal and state legislatures to limit the impact of that holding.²⁸² This reaction to *Kelo*, in fact, may result in significant constraints on the power of government to take private land for any economic development.²⁸³ It is important to realize that in the wake of such a widely criticized decision, in the rush to cure the defect, something may be missed or a consequence may go unnoticed.²⁸⁴ Imposing a moratorium on eminent domain power for economic development while the legislature can carefully consider its options is a prudent course of action that can ensure thoughtful and rational reaction to the decision. Broad sweeping remedies, such as a blanket restriction on economic development satisfying a public use, go too far. Economic development still has a place as a public use in certain circumstances when it is aimed at curing a specifically identifiable harm to society. Admittedly, Alabama and Texas, which have acted through a special session of the legislature to pass legislation limiting the eminent domain power within the state,²⁸⁵ have both drafted legislation that does not, on its face, sweep too broadly. Even so, it remains to be seen whether the state courts, where these litigation battles increasingly will be fought, will construe this legislation to prohibit all such economic development takings, thereby significantly restricting even broadly acceptable eminent domain power.

²⁸² See *supra* Part V.

²⁸³ See *supra* Part VI.

²⁸⁴ See *supra* Part VI.B.

²⁸⁵ See *supra* notes 189–202 and accompanying text.